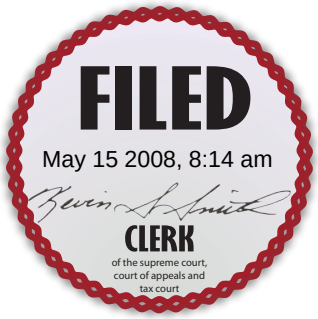


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF: C.G. and L.C., the Children, | ) | |
| D.P., Father, | ) | |
| Appellant-Respondent, | ) | |
| vs. | ) | No. 02A05-0707-JV-388 |
| STATE OF INDIANA, | ) | |
| Appellee-Petitioner. | ) | |

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable William Briggs, Senior Judge
Cause Nos. 02D07-0606-JT-127 and 02D07-0606-JT-190

**May 15, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

D.P. ("Father") appeals the trial court's termination of his parental relationships with his children, L.C. and C.G.

We affirm.

## ISSUE

Whether the trial court erred when it terminated Father's parental relationships.

## FACTS

M.C. ("Mother") is the biological mother of L.C., born November 24, 2004.[1] On July 1, 2005, while Mother was on home detention, a search of her home yielded drugs, guns, and knives. The Allen County Department of Child Services ("the ACDCS") removed L.C. from Mother's care and placed her into licensed foster care,[2] where she has remained since. On August 5, 2005, the Allen County Department of Child Services filed a petition alleging that L.C. was a child in need of services ("CHINS").

At the initial hearing on August 9, Mother admitted that due to her incarceration, she was unable to care for her children. She also admitted that she could not provide them with adequate food provisions and diapers, and had exposed them to an unclean and unsafe environment. Father admitted that he was L.C.'s father, but denied the ACDCS' other allegations, including the allegation that he was unable or unwilling to care for L.C. The trial court heard evidence, found L.C. to be a CHINS, and ordered that she remain in

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[1] Mother is not a party to this appeal.

[2] The ACDCS also removed Mother's children, E.C. and A.C. Bruce Christlieb is the biological father of E.C. and A.C.

foster care. On August 24, 2005, the trial court adopted a parent participation plan with regard to L.C. and ordered Mother and Father to comply with its terms.

On November 8, 2005, Mother gave birth to C.G. G.G. was believed to be C.G.'s father. On November 11, 2005, C.G. was removed from the hospital and placed into foster care because Mother was not complying with the court's orders under the parent participation plan. At a detention hearing on November 15, 2005, the trial court ordered Mother and G.G. to comply with the parent participation plan and further, ordered G.G. to initiate paternity proceedings. On December 2, 2005, the ACDCS filed a verified petition alleging that C.G. was a CHINS. At the initial dispositional hearing on December 8, 2005, the trial court heard evidence and adjudicated C.G. as a CHINS. Thereafter, DNA tests revealed that G.G. was not C.G.'s father. Subsequent tests found by a high statistical probability that Father, herein, was also the biological father of C.G. On November 21, 2006, the trial court conducted a modification hearing, wherein it altered the dispositional decree to include Father in the modified parent participation plan for C.G.

The trial court conducted the termination proceedings on March 5 and March 22, 2007. Extensive testimony was heard with regard to the unique medical needs of the children and Mother and Father's ability to meet those needs. The children's foster mother, Robin Foust,[3] gave testimony as to L.C. and C.G.'s medical concerns. Foust testified that both children suffer from significant eczema requiring the administration of

[3] At the time of the termination hearing, Foust was the foster parent to all four of Mother's children.

special bath soaps, prescribed steroid creams, and/or antibiotics. The children also suffer from asthma and allergies, which require the frequent use of a nebulizer and doses of Zyrtec, respectively.[4] Foust testified that she measures, in their appropriate proportions, the respective chemicals that are combined in the children's nebulizer; assembles the machine and tubing; and adheres to precise cleanliness requirements for the machine. Foust also testified that by recommendation of the children's allergist, asthma specialist, and ENT and developmental pediatrician, neither child may be exposed to cigarette smoke, even passive smoke from people's clothing. Foust is a nonsmoker. Foust testified that Father gave her clothing for the children, which smelled like smoke.

Foust testified further that C.G. must adhere to a strict diet, particularly given his allergy to eggs and foods containing eggs. L.C., on the other hand, suffers from sleep apnea, which requires vigilant attention from Foust when L.C. is asleep. Foust testified further that L.C.'s condition is exacerbated by her enlarged tonsils and adenoids, which may necessitate surgical removal in the future. Foust testified that the children see three different medical specialists at least once each month.

Another witness, clinical psychologist Dr. John Musgrave, testified that he conducted a psychological evaluation of Father and arrived upon a recommendation, which was informed by the results of parenting and personality inventories, intelligence quotient (IQ) measures, clinical interviews, and other data. Dr. Musgrave testified that Father "can decode words" and "sound them out" at a fourth grade level, and his IQ test

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[4] L.C. was required to use the nebulizer every morning and evening, while C.G. must use it every four hours.

result of 75 indicates that he is cognitively functioning "in the borderline range or the below-average range."[5] (2nd Tr. 25, 26).[6] Dr. Musgrave testified further that two of Father's test results were rendered invalid by Father's attempts to "put[ ] forth an excessively positive picture of himself." (2nd Tr. 27). Dr. Musgrave later explained that, in his view, the latter stemmed from Father's "poor reading level and lower cognitive functioning [rather] than . . . a willful act at deception." (2nd Tr. 32).

In his overall assessment of Father's individual level of functioning and parenting abilities, Dr. Musgrave testified that Father would require "a lot of support and assistance from family, outside agencies, whoever can help." (2nd Tr. 29). However, Dr. Musgrave would recommend a six-month period in which Father would receive home-based services, while also continuing to take parenting classes. He suggested that the services be withdrawn after six months in order to assess Father's ability to function as a parent. Dr. Musgrave testified that even after the six-month period, Father would still require support.

Specifically, with regard to the children's unique medical needs, Dr. Musgrave testified that Father would require assistance with medical terminology and with the particulars involved in caring for special needs children, such as remembering doctors' appointments, transportation to and from the same, and keeping track of medication schedules. Asked whether he would have reservations about Father's ability to care for

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[5] Dr. Musgrave testified that a score of 69 and below is in the mentally-retarded or -handicapped range.

[6] The record contains two transcripts, each chronicling one day of the two-day termination hearing. Herein, we refer to the March 5, 2007 transcript as "1st Tr.," and the March 22, 2007 transcript as "2nd Tr."

the children having not completed the six-month period of services, Dr. Musgrave testified that he would, especially regarding Father's ability to meet the children's needs.

> They are high needs kids with medications, appointments and what not. It is my understanding that at the time of the assessment he was working third shift. If you have kids in the home and you're working third shift, there's got to be someone else there to care for them when they sleep. There will have to be those kinds of supports in place.

(2nd Tr. 31). Dr. Musgrave testified that appropriate support from family members who were "available and [who played] an active role in [Father's] life" would be beneficial and "safer for the kids." (2nd Tr. 32, 36).

Family case manager, Brenda Coffel, testified that Father loves his children, but lacks the cognitive and coping skills and family support necessary to properly care for them. She testified,

> [Father] would have a lot of difficulty caring for the kids 24/7 and meeting all of their needs without all of his family's support. It's been my experience that the family is very supportive at the Court hearing and then that support falls off.
>
> * * *
>
> [Father's family members] come to Court and they say, 'Yes, we want to do everything to help [Father] keep [his] children," and then it goes by the wayside. People have their own lives and they can't be there 24/7. If [Father] needs the 24/7 support, perhaps [placement with him is] not the best choice for the children.
>
> * * *
>
> I don't know [Father's] family that well because I have not had that much contact with them. I think the biggest thing would be I know they all smoke.[7] These children all have serious allergy problems and [Father's] solution was, 'I'll tell them to quit.' I don't know if the family members are going to quit just because they're told to quit.

(2nd Tr. 75-77).

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[7] The record reveals that Father's father, mother, grandmother, sister and her boyfriend smoke cigarettes.

Rex McFarren, director of the Allen County court-appointed special advocate (CASA) program, testified that Father loves his children, but has displayed an "inability to plan ahead, the inability to realize the damage to L.C. and C.G. or the impact on their medical condition[s]" from his decisions, particularly with regard to smoking. (2nd Tr. 92). McFarren testified that he had concerns about Father's ability to care for the children's special needs, given their ongoing medical issues, frequent doctors' appointments, specialized breathing treatments and the like. With reference to Dr. Musgrave's recommendation that Father receive six months of home-based services followed by an assessment period, McFarren expressed concern about the effect of additional delay on the children's sense of stability.

McFarren testified that reunification could not reasonably be considered until the ACDCS (1) had become more confident that Father understood and could properly manage the children's medical issues; (2) had thoroughly ensured that Father's home was smoke and allergen-free; and (3) could state with assurance that the children were not coming into contact with smokers. McFarren concluded that he believed that these determinations would take considerable time, and that "the children do not deserve to be kept in limbo for another additional nine (9) to twelve (12) months while we go on a possibility that [Father] might be able to do it." (2nd Tr. 93).

On June 13, 2007, the trial court terminated Father's parental relationships with L.C. and C.G. Father now appeals.

Additional facts will be provided as necessary.

## DECISION

Father argues that the ACDCS failed to prove by clear and convincing evidence that either (1) a reasonable probability existed that the conditions that resulted in the children's removal would not be remedied; or (2) that the continuation of the parent-child relationship posed a threat to the children's well-being. We disagree.

When reviewing termination of parental rights proceedings on appeal, we neither reweigh the evidence nor judge the credibility of witnesses. *In re T.F.*, 743 N.E.2d 766, 773 (Ind. Ct. App. 2001). We consider only the evidence that supports the trial court's decision and the reasonable inferences that may be drawn from that evidence. *Id.* In deference to the trial court's unique position to assess the evidence, we set aside the judgment terminating a parent-child relationship only if it is clearly erroneous. *Id.* If the evidence and inferences support the trial court's decision, we must affirm. *Id.*

Although parental rights are of a constitutional dimension, the law provides for the termination of those rights when the parents are unable or unwilling to meet their parental responsibilities. *Matter of A.N.J.*, 690 N.E.2d 716, 720 (Ind. Ct. App. 1997). The purpose of terminating parental rights is not to punish the parents, but to protect their children. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999). To effect the involuntary termination of a parent-child relationship, the State must plead and prove in relevant part that

> (B) there is a reasonable probability that:
>
> (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or

(ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;

(C) termination is in the best interests of the child; and

* * *

(D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 321-35-2-4(b)(2). These allegations must be established by clear and convincing evidence. *A.N.J.*, 690 N.E.2d at 720.

We first note that because subsection (b)(2)(B) is written in the disjunctive, the trial court need only find one of the two elements by clear and convincing evidence; thus, termination is proper if the ACDCS established that the conditions leading to the removal would probably not be remedied **or** that the continuation of the parent-child relationship posed a threat to L.C. and C.G.'s well-being. *Castro v. State Office of Family and Children*, 842 N.E.2d 367, 373 (Ind. Ct. App. 2006). Accordingly, we turn our attention to whether the evidence supports the finding that the continuation of the parent-child relationship posed a threat to L.C. and C.G.'s well-being.

Here, the ACDCS presented ample evidence to demonstrate that continuation of Father's parent-child relationship posed a threat to the well-being of his children. Several witnesses testified that Father loves L.C. and C.G. dearly, but lacks the requisite skills to properly provide for special needs children. The trial court heard evidence that indicated that Father lacks the cognitive skills necessary to safely attend to the children's medical needs, particularly with regard to the administration of medication and the adherence to strict medical instructions. The children's medical concerns – sleep apnea, asthma, significant food and smoke allergies, skin conditions, stringent nebulizer regimens, and

medication dosage requirements – warrant vigilant supervision and scrupulous attention to detail.

Dr. Musgrave testified that Father operates at a "poor reading level and lower cognitive functioning," "can decode words at a fourth grade level," and falls in the borderline or below average range on intelligence tests. (2nd Tr. 32, 25). Thus, Dr. Musgrave concluded that Father would "struggle" with critical "coordinating, organizing, maintaining" skills; would require assistance with reading medical terminology; and generally, would require "adequate and appropriate support surrounding him . . . ." (2nd Tr. 34, 36).

Unfortunately, the evidence indicates that Father lacks the consistent and reliable family support necessary for his full-time caring for the children. The trial court heard testimony that Father intended to work the third shift, from 11:00 p.m. to 7:20 a.m., even in the event that he was reunited with his children. Given L.C.'s sleep apnea, such a schedule would be ill-advised at best, unless appropriate alternate supervision options were employed. Family case manager Coffel testified that Father explained his plan to provide for the children's supervision as follows:

> I had asked him if the children come home what he would do with them because he works third shift. He said his sister's boyfriend works third shift with him also. They would take turns staying up and watching each other's children.

(2nd Tr. 70). Coffel added, "I had concerns like that. I know there were concerns that he couldn't care for himself and how could he care for himself with the children[?]" (2nd Tr. 70).

The trial court heard evidence indicating that despite the best intentions of Father's family members, work and other commitments would prevent them from devoting the requisite time to assisting Father with L.C. and C.G.; and further, that their personal habits of being long time smokers posed a danger to the children's health. Father testified that he intended to rely on his father, mother, grandmother, sister, and her boyfriend for baby-sitting support. The record further revealed that every single one of these individuals smokes cigarettes. When family case manager Coffel raised this issue with Father, he responded that "he would tell them to quit." (2nd Tr. 68). Father testified that he too was "going to quit" smoking; however, he acknowledged his own difficulties breaking the habit, admitting that he had smoked a cigarette on the morning of the termination hearing. (1st Tr. 52).

Lastly, L.C. and C.G. have been in foster care for nineteen months and sixteen months respectively. CASA McFarren testified that the children need stability and expressed his concern at deferring the children's placement for adoption based on the "possibility that [Father] might be able to do it." (2nd Tr. 93). The record reveals that foster mother Foust has expressed a desire to adopt L.C., C.G. and their other two siblings; moreover, the trial court found that the ACDCS has a satisfactory plan for the care and treatment of the children, which is placement for adoption through the Catholic Charities.

For these reasons, the trial court found by clear and convincing evidence that the continuation of Father's parent-child relationships with L.C. and C.G. posed a threat to the children's well-being. "[P]arental rights, while constitutionally protected, are not

absolute and must be subordinated to the best interests of the child when evaluating the circumstances surrounding termination." *McBride v. Monroe County Office of Family and Children*, 798 N.E.2d 185, 199 (Ind. Ct. App. 2003). Thus, the trial court need not wait until a child is irreversibly harmed such that the child's physical, mental, and social development is permanently impaired before terminating the parent-child relationship. *Id*. Based upon the foregoing, we do not conclude that the trial court's judgment was clearly erroneous.

Affirmed.

NAJAM, J., and BROWN, J., concur.